United States of America v. John C. Dalton, IV et al., Case No. SACV 21-00140 JVS (JDEx)

TENTATIVE Order Regarding Motions to Exclude Experts [114], [115], [119]

Defendants John C. Dalton, IV, John C. Dalton, V, and Matthew J. Dalton (collectively, "Defendants" or "Daltons") move to exclude the expert report and testimony of Dr. Jennifer Blouin ("Blouin"). Mot. Exclude Blouin, Dkt. No. 119. The Government opposed, and the Daltons replied. Opp'n Mot. Exclude Blouin, Dkt. No. 124; Reply Mot. Exclude Blouin, Dkt. No. 139.

Plaintiff United States (the "Government") moves to exclude certain opinion testimony of the Daltons' disclosed rebuttal expert, John J. O'Donnell ("O'Donnell"). Mot. Exclude O'Donnell, Dkt. No. 114.[1] The Daltons opposed, and the Government replied. Opp'n Mot. Exclude O'Donnell, Dkt. No. 128; Reply Mot. Exclude O'Donnell, Dkt. No. 133.

The Government also moves to exclude the Daltons' disclosed rebuttal expert, Michael Rountree ("Rountree") for failure to provide an expert report and the prejudice resulting from this improper disclosure. Mot. Exclude Rountree, Dkt. No. 115.[2] The Daltons opposed and the Government replied. Opp'n Mot. Exclude Rountree, Dkt. No. 129; Reply Mot. Exclude Rountree, Dkt. No. 131.

The Court reviewed the parties' briefing and accompanying expert and rebuttal reports. For the following reasons, all motions are **DENIED in part** and **GRANTED in part.**

I. BACKGROUND

In this case, the Government seeks monetary judgments from the Daltons based on the assertion that each "received, directly or indirectly, fraudulently transferred funds from Dalton West Coast, Inc [("DWC")] related to an abusive

[1]The Court refers throughout to Dkt. No. 114-1, the memorandum of points and authorities, as Mot. Exclude O'Donnell.

[2]The Court refers throughout to Dkt. No. 115-1, the memorandum of points and authorities, as Mot. Exclude Rountree.

tax shelter that left [Dalton West] with insufficient assets to pay its 2006 federal income tax liability." Compl., Dkt. No. 1, ¶ 1.

The dispute centers around the consequences of a transaction that took place in March 2006, in which the Daltons, as the sole shareholders of DWC, sold all of DWC's stock to an unrelated entity called CDD Holdings, LLC ("CDD") (the "March 2006 Stock Sale" or the "March 2006 Transaction"). CDD purchased all of the DWC stock for $18,885,584. At the time of the March 2006 Stock Sale, the Daltons' certified public accountant, Michael Rountree, created a balance sheet for DWC that reported $24,227,070.64 in cash as DWC's only tangible asset. That balance sheet also reported $10,682,972 as a pro forma estimate of potential federal and state tax liabilities as DWC's only liabilities.

On January 27, 2011, a federal income tax assessment in the amount of $9,413,246 was made against DWC. The Government filed this suit on January 22, 2021. Compl., Dkt. No. 1. The Government's theory of the Daltons' liability is based on the Daltons being fraudulent transferees under the California Uniform Fraudulent Transfer Act ("CUFTA"), Cal. Civ. Code § 3439 (2007).

The Government disclosed Dr. Jennifer Blouin ("Blouin") as their expert with Blouin's accompanying expert report. See Report of Jennifer Blouin ("Blouin Report"), Dkt. No. 124-2. The Daltons disclosed John O'Donnell and O'Donnell's accompanying report for rebuttal expert testimony. See Report of John O'Donnell ("O'Donnell Report"), Dkt. No. 114-3. The Daltons also disclosed Michael Rountree, the Daltons' accountant who conducted diligence on the 2006 Transaction, to provide rebuttal testimony to Blouin's expert report. Decl. of Russell Edelstein ("Edelstein Decl."), Ex. 83, Dkt. No. 115-3 at 3. Rountree did not provide a report.

II. LEGAL STANDARD

Federal Rule of Evidence 702 permits expert testimony from "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education," if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence

or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. A trial court's "gatekeeping" obligation to admit only expert testimony that is both reliable and relevant is especially important "considering the aura of authority experts often exude, which can lead juries to give more weight to their testimony." Mukhtar v. Cal. State Univ., 299 F.3d 1053, 1063-64 (9th Cir. 2002). Nevertheless, "[s]haky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." Primiano v. Cook, 598 F.3d 558, 564 (9th Cir. 2010).

After admissibility is established to the court's satisfaction, attacks aimed at the weight of the evidence are the province of the fact finder, not the judge. Pyramid Techs., Inc. v. Hartford Cas. Ins. Co., 752 F.3d 807, 814 (9th Cir. 2014). The court should not make credibility determinations that are reserved for the jury. Id. In other words, the Court's gatekeeper role under Daubert is "not intended to supplant the adversary system or the role of the jury" and the Court should not "make ultimate conclusions as to the persuasiveness of the proffered evidence." Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd., 326 F.3d 1333, 1341 (11th Cir. 2003) (internal quotation marks and citation omitted).

The Rule 702(a) requirements address an expert's qualifications and the relevance of the opinions he or she offers, and the requirement set forth in Rule 702(b) relates to the foundation underlying the expert opinions. The requirements set forth in Rule 702(c)-(d) most directly address the reliability of the expert opinions.

III. DISCUSSION

A. Daltons' Motion to Exclude Blouin

The Daltons move to exclude the Government's expert, Blouin, on two main grounds: (1) Blouin lacks experience/qualifications in relevant area, and (2) the

fact that her opinion are unreliable and in particular based on "common sense," which is improper expert testimony. Mot. Exclude Blouin.

i. Blouin's Qualifications

The Daltons contend that Blouin is not qualified to offer expert opinion testimony regarding the stock sale transaction because those opinions are "based solely on a general academic background in economics and approximately five years of working at an accounting firm after college in the 1990s." Mot. Exclude Blouin at 1-2.

Pursuant to Rule 702, an expert must be "qualified as an expert by knowledge, skill, experience, training, or education[.]" Fed. R. Evid. 702. "Under Ninth Circuit law, an expert may be qualified through either practical training or academic experience. The threshold for qualification is low for purposes of admissibility; minimal foundation of knowledge, skill, and experience suffices." Oddo v. Arocaire Air Conditioning & Heating, No. 218CV07030CASEX, 2020 WL 5267917, at *6 (C.D. Cal. May 18, 2020) (quoting PixArt Imaging, Inc. v. Avago Tech. Gen. IP (Singapore) Pte. Ltd., No. 10-cv-00544-JW, 2011 WL 5417090, at *4 (N.D. Cal. Oct. 27, 2011)) (internal citations omitted); see also Rogers v. Raymark Indus., Inc., 922 F.2d 1426, 1429 (9th Cir. 1991) ("A witness can qualify as an expert through practical experience in a particular field, not just through academic training.").

Here, Blouin has significant academic experience and scholarship. After her undergraduate degree, Blouin obtained a Ph.D in 2004 with a concentration in Accounting from the University of North Carolina Chapel Hill Kenan-Flagler Business School. Declaration of Dr. Jennifer Blouin ("Blouin Dec."), Dkt. No. 124-8 ¶ 5. For the past 20 years, she has taught accounting at the Wharton School of the University of Pennsylvania, teaching both undergraduates and graduate students (including full-time and executive MBA students). Id. ¶ 6. Blouin focused her research on the application of financial principles and economics to corporate entities, including how taxes affect business decisions. Id. ¶¶ 6–7. Blouin's primary course at Wharton, which she has taught for approximately 20 years, is called "Taxes and Business Strategy." Id. ¶ 8. The course covers structuring business transactions, the costs and benefits of stock sales compared to asset sales, and related tax concepts. Id. Blouin's academic expertise appears

closely related to the issues she opines on, namely, the structure of the 2006 Stock Sale transaction, the tax implications, and the "red flags" of the Transaction.

The Daltons argue that Blouin's extensive curriculum vitae is nonetheless irrelevant because she is not a business valuation expert and has never been directly involved in the sale of a business. Reply to Mot. Exclude Blouin at 15-16. As an initial matter, Blouin's opinions are not based on business valuation alone, but also the events, parties, and transactions leading up to the 2006 Transaction, as well as "the impact taxes had on the transaction structure and stock price." Opp'n at 13; see generally Blouin Report. The Court further rejects that business valuation is the only relevant issue in the case. See id. at 16 (asserting that "all of [Blouin's] opinions ultimately stem from the purchase price exceeding what she would have expected"). More importantly, Blouin clearly has more than the "minimal foundation of knowledge, skill, and experience required" to be qualified as an expert and to opine on the issues in this case. Thomas v. Newton Int'l Enterprises, 42 F.3d 1266, 1269 (9th Cir. 1994). Upon review, the Court finds that Blouin's education and professional experience satisfy the requirements of Rule 702. The can of course be tested on cross examination.

ii. Reliability of Blouin's Opinions

The Daltons assert that Blouin's opinions are unreliable because (1) Blouin's opinions are based on "common sense" improper for expert testimony, Mot. Exclude Blouin at 8-13; and (2) Blouin's opinions otherwise lack reliable principles or methods and do not apply sound methodology to the facts of the case, id. at 13-18.

Regarding the first issue, the Court rejects the assertion that Blouin's expert opinions are "common sense" layperson opinions. The purpose of expert testimony is to decode technical concepts so they are comprehensible to a layperson. Fed. R. Evid. 702(a) (an expert may testify in the form of an opinion if it "will help the trier of fact to understand the evidence or to determine a fact in issue"). The fact that Blouin is able to distill several of her conclusions into "common sense" does not mean that the initial concept itself was common sense. In fact, the "common sense" conclusions are based on a breakdown of economic and tax principles as applied to the business structures and transactions and transactions at issue. For example, the Daltons refer to several statements where

Blouin opines that the price of the stock "did not make sense." See, e.g., Mot. Exclude Blouin at 10. These are not layperson observations–in context, these are conclusions drawn based on specialized knowledge of stock sales and transaction structures. In short, Blouin is doing her job.

Second, the Daltons argue that Blouin's opinions and report lack a reliable methodology, and that Blouin does not reliably apply principles to the facts of the case.

The test of reliability is flexible, and the district court "has discretion to decide how to test an expert's reliability as well as whether the testimony is reliable, based on the particular circumstances of the particular case." Pyramid Techs., Inc. v. Hartford Cas. Ins. Co., 752 F.3d 807, 813 (9th Cir. 2014) (citing Primiano v. Cook, 598 F.3d 558, 563 (9th Cir. 2010), as amended (Apr. 27, 2010)). Expert testimony "is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline." Primiano, 598 F.3d at 565.

In conducting her analysis, Blouin relied on her own education and experience, as well as materials including DWC annual balance statements, DWC profit & loss statements, Cintas SEC filings, a long list of documents produced in this case, interrogatories, depositions, and academic materials. See Blouin Report at 2, App'x B. Blouin's opinions are rooted in both the facts of this case and in the relevant discipline, i.e., tax implications on business and transaction structures. Contrary to the Daltons' assertions, it is clear how Blouin's experience allows her to draw her conclusions, and Blouin connects the dots analytically in coming to those conclusions. See e.g., id. at 19-23 (discussing implications of other transaction structures in step-by-step discussion). The Daltons repeatedly assert that Blouin's opinions are "mere *ipse dixit*"–that is, 'because I said so' opinions. Mot. Exclude Blouin at 15. But saying it does not make it so. The Court finds that Blouin's opinions and conclusions are supported clearly and adequately with citations to the record, testimony, and relevant documents. It is not the case that there is "too great an analytical gap between the data and the opinion proffered," or indeed, any gap at all. Gen. Elec. v. Joiner, 522 U.S. 136, 146 (1997).

The Daltons argue that Blouin's calculation regarding the valuation of DWC is "simplistic" and argue, in essence, that it should be excluded for that

reason alone. See Mot. Exclude Blouin at 16. Blouin explains how and why she arrived at the calculations she uses. See Blouin Report at 13-16. The fact that the Daltons disagree with Blouin's conclusion on the valuation does not render her methodology unreliable. See Primiano, 598 F.3d at 565 ("The test under Daubert is not the correctness of the expert's conclusions but the soundness of his methodology."); see also Siqeiros, et al., v. General Motors LLC, No. 16-CV-07244-EMC, 2022 WL 74182, at *11 (N.D. Cal. Jan. 7, 2022) ("Where a party challenges the expert's assumptions, the challenges may go to impeachment, rather than admissibility.") (citation omitted). Nor does the fact that the methodology is simple require its exclusion.

Here, the reasoning is sound, tied to the facts of the case, and relevant, which makes the opinions admissible.

iii. Opinions about the Daltons' Intent or Knowledge

The Daltons assert that "all of Dr. Blouin's opinions constitute improper attempts to describe the Daltons' intent, knowledge, or state of mind at the time of the stock sale." Mot. Exclude Blouin at 21-22.

It is true that it would be improper for Blouin to opine as to the subjective intent of the Daltons. See Lanard Toys Ltd. v. Anker Play Prod., LLC, No. 19-cv-4350-RSWL-AFMX, 2020 WL 6873647, at *7 (C.D. Cal. Nov. 12, 2020) (collecting cases). This is because "[e]xpert testimony as to intent, motive, or state of mind offers no more than the drawing of an inference from the facts of the case." Id. Accordingly, it is improper for Blouin to draw inferences for the jury as to the Daltons' state of mind. However, Blouin's opinions that certain aspects of the transactions should have been a "red flag" or that the Daltons had reason to believe the stock sale purchase price was "too good to be true" are permissible. Although it does not require an expert to present evidence that the Daltons were in fact aware of their tax liability or that the price was uneconomical (indeed, the former fact is largely undisputed), Blouin may testify regarding issues that would lead a jury to make that inference. For example, that the transaction was uneconomical, that the Daltons had a high level of business sophistication, the information available to the Daltons, and the idea that these factors would raise red flags.

Blouin's report contain the following opinions as to the Daltons' state of mind: (1) that "there is evidence to suggest not only that the Stock Sale purchase price was uneconomical, **but also that the Daltons were aware of this fact**"; (2) that the Daltons "**seem to have been fully aware** of the value of DWC's tax liability"; (3) that the Daltons "**seemed to be aware that**, at the time of the Stock Sale, DWC had significant outstanding tax liabilities as a result of the preceding Asset Sale"; and (4) that the Daltons "**were aware of the large tax liabilities held in DWC.**" Blouin Report at 32, 34, 35, 47 (emphasis supplied). The Daltons assert that these opinions permeate Blouin's Report and render the entire Report improper opinion testimony. The Court agrees that whether the Daltons were aware of the uneconomical nature of the Transaction or of DWC's tax liability is an inference that the jury should draw based on the evidence. But aside from the phrases cited above, the Report primarily contains only those permissible opinions discussed in the preceding paragraph.

Accordingly, Blouin's Report and opinions are not inadmissible on these grounds. The Court **STRIKES** only those statements that explicitly state the Daltons' awareness and otherwise **DENY** the Daltons' motion to exclude Blouin's opinions and report.

B. Government's Motion to Exclude Certain of O'Donnell's Opinions

The Government moves to exclude three opinions that it contends O'Donnell holds: (1) that the jury should ignore what a reasonable buyer would pay for DWC's stock and look only to what the buyer offered without consideration of the buyer's intentions ; (2) the jury should ignore the substance of the Transaction and look only to its form; and (3) DWC was solvent. See Mot. Exclude O'Donnell at 2.

i. O'Donnell's Opinion Regarding Value of DWC's Stock to Buyer

The Government asserts that it is O'Donnell's opinion that the purchase price of the DWC stock was reasonable for the mere fact that a buyer agreed to pay that price. See Mot. Exclude O'Donnell at 6. This is a mischaracterization of O'Donnell's opinion. In fact, in his expert report, O'Donnell explains how Blouin came to her valuation of the stock sale "via the Asset Approach," and calls that

approach "superficial." O'Donnell Report at 21. O'Donnell then opines that there are additional necessary considerations in "determining the value of DWC **to the Buyer** at the time of the acquisition," including investment value. Id. (emphasis in original). In fact, O'Donnell provides a list of principles of business valuation, and then expounds further upon investment value. See O'Donnell Report at 20-22.

O'Donnell does testify that "the value of the DWC stock on March 22nd was the price paid by the purchaser. . . It's the definition of fair market value, so I did not need to perform valuation services to determine what the value was." Decl. of Gregory Mokodean ("Mokodean Decl."), Ex. A ("O'Donnell Dep."), Dkt. No. 114-5 at 4.[3] Further, O'Donnell testified that performing a business valuation was outside the scope of his engagement. Id. Indeed, O'Donnell's report confines itself to criticizing Blouin's valuation. Rather than providing a rebuttal valuation, O'Donnell opines on additional approaches and principles that O'Donnell contends that Blouin ignored. See O'Donnell Report at 20-21.

Because O'Donnell explicitly declines to provide an opinion on valuation or provide a methodology for valuation, it would be improper for O'Donnell to opine on the valuation of the stock. However, it is not improper for O'Donnell to opine on the considerations that he believes that Blouin ignored in coming to her own conclusions about the valuation. Any of the Government's other disagreements with O'Donnell's opinions or his qualifications on this issue can be aired on cross-examination.

ii. O'Donnell's Opinion that Jury Should Look to Form of Stock Sale Rather than Substance

The Government asserts that it is O'Donnell's opinion that, because of the stock sale, the Daltons are not responsible for DWC's unpaid 2006 taxes.

In his deposition, O'Donnell testifies that "[i]t wasn't [the Daltons'] responsibility" to pay the taxes assessed on DWC and expressed he did not see how the 2006 Stock Sale constituted a fraudulent transfer. O'Donnell Dep. at 14, 17. O'Donnell's report contains similar conclusions. On page 5, O'Donnell

[3]The Court refers to the page numbers inserted by the CM/ECF system.

opines: "Dr. Blouin incorrectly asserts that DWC retained responsibility for hte tax liability subsequent to the sale," id. at 5, and on page 13: "As of March 22, 2006, the Defendants were no longer responsible for the tax obligation (or burden for that matter). . . ." Id. at 13.

The Government argues that this opinion that the Daltons are not responsible for DWC's unpaid 2006 taxes is improper expert testimony because it is a legal conclusion. Mot. Exclude O'Donnell at 15. The Court agrees. "[A]n expert witness cannot give an opinion as to her legal conclusion, i.e., an opinion on an ultimate issue of law. Similarly, instructing the jury as to the applicable law is the distinct and exclusive province of the court." Nationwide Transp. Fin. v. Cass Info. Sys., Inc., 523 F.3d 1051, 1058 (9th Cir. 2008) (quoting Hangarter v. Provident Life & Accident Ins. Co., 373 F.3d 998, 1016 (9th Cir. 2004)).

In opposition, the Daltons argue that even if O'Donnell does include a legal conclusion as an opinion, the opinion only rebuts Blouin's own improper legal argument that the Daltons **were** responsible for the tax liability. See Opp'n Mot. Exclude O'Donnell at 11-12. The Daltons fail to point out where Blouin states this opinion. Blouin states in her report: "[W]hile the sale of DWC's stock shifts the tax compliance responsibility. . . it does not necessarily shift the economic burden of the taxes" because "any rational buyer would anticipate the tax liability it would be inheriting" would "reduce the amount [the buyer] is willing to pay for the shares of DWC." Blouin Report at 21. The Court rejects that this is a legal argument "dressed up in 'economics' clothing." Opp'n Mot. Exclude O'Donnell at 11. It is in fact an opinion based in economics about how taxes affect transactions and stock sales. The "economic burden" Blouin refers to is not a legal burden, but a factor that affects the price of the transaction. Similarly, the ability to cherry pick phrases from Blouin's report that are similar to language the Government has used in briefing does not establish that Blouin is parroting the Government's arguments. See Opp'n Mot. Exclude O'Donnell at 12.

In contrast, O'Donnell's opinion is that the Daltons were not responsible for the taxes resulting from the 2006 Transaction after the stock sale. But in contrast to being an "ultimate fact," e.g., that the Daltons had no constructive knowledge of the tax-motivated nature of the Transaction (for purposes of refuting application of substance-over-form), the Daltons' liability for the taxes is a legal question at issue in this case. Just as it would be improper for Blouin to conclude that the

Daltons are in fact liable under CUFTA, it is improper for O'Donnell to conclude the opposite. Hangarter, 373 F.3d at 1016 ("[A]n expert cannot give an opinion as to her *legal conclusion*, i.e., an opinion on an ultimate issue of law.") (emphasis in original).

Accordingly, this opinion shall be excluded. The Court **STRIKES** the opinions from O'Donnell's report on pages 5 and 13 as stated above.

iii. O'Donnell's Opinion that DWC Was (Briefly) Solvent

O'Donnell opines that DWC was solvent and had the ability to pay its federal tax liability following the 2006 Transaction. O'Donnell Report at 5, 15. The Government contends that this opinion should be excluded for two reasons: (1) the opinion is not offered in rebuttal and therefore is untimely disclosure; and (2) O'Donnell looked only to the exact moment of the transfers and does not analyze DWC's insolvency under any of the tests articulated in Cal. Civ. Code § 3439(a)(2). Mot. Exclude O'Donnell at 17-19.

The Daltons argue that the opinion was not untimely disclosed; and that the fact that DWC was solvent at the time of the stock sale rebuts Blouin's opinion that the offer the Daltons received was inconsistent with the expectation that DWC would pay the estimated tax liability. Opp'n Mot. Exclude O'Donnell at 15; see Blouin Report at 16. The Court agrees. The Blouin Report does not explicitly opine on the question of solvency versus insolvency. However, it contains several opinions relevant to the issue of DWC's solvency, particularly with regards to whether the purchase price of the DWC stock was a "red flag" given the assets and liabilities held by DWC. O'Donnell then opines that DWC was sufficiently solvent to pay that tax liability and that CDD in particular had the funds to both purchase DWC stock at that price and maintain DWC's funds to pay the tax liability. See O'Donnell Report at 15. This is sufficiently related to serve as rebuttal. Further, as the Daltons point out, the question of insolvency is part of the Government's affirmative burden to prove, and the Blouin Report arguably is entirely about the Government's theory of DWC's insolvency via substance-over-form principles. TCL Commc'ns Tech. Holdings Ltd. v. Telefonaktenbologet LM Ericsson, No. 15-cv-02370 JVS, 2016 WL 7042085, at *6 (C.D. Cal. Aug. 17, 2016) (where party has burden of proof those opinions should be in opening reports). Accordingly, the opinion is on the "same subject matter" of Blouin's

report and appropriate for inclusion in the rebuttal report. See id.

As to the Government's second issue, the Government is apparently objecting to the Daltons' theory of solvency because it disagrees with that theory. As the Daltons point out, looking at the assets and liabilities on DWC's balance sheet is one way of determining solvency. See Cal. Civ. Code § 3439.02(a)(a) ("A debtor is insolvent if, at a fair valuation, the sum of the debtor's debts is greater than the sum of the debtor's assets."). But the Government is also correct that it "does not need to show that DWC was insolvent at the moment of the fraudulent transfers," and that the CUFTA provides three other tests of DWC's insolvency. Mot. Exclude O'Donnell at 19. The disagreement over the facts and ultimate result of the case is not a basis for excluding O'Donnell's opinion. Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc., 738 F.3d 960, 969–70 (9th Cir. 2013) ("[T]he judge is supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable. The district court is not tasked with deciding whether the expert is right or wrong . . .")

The Government contends that the basis for O'Donnell's conclusion is insufficient. It may attack that basis on cross-examination. See id.

C. Government's Motion to Exclude Rountree

Rountree has been the Daltons' outside accountant for over twenty years, including at the time of the March 2006 transaction. On June 10, 2022, the Daltons disclosed that Rountree would provide rebuttal expert testimony to the Government's disclosed expert, Blouin, with the following disclosure:

> Defendants identify Michael Rountree, as a non-retained expert witness to provide rebuttal testimony to the expert report and testimony from Plaintiff's witness Jennifer Blouin including his opinions that: (1) the stock sale transaction and related documents were arms-length, involved fair value, reasonable, valid and had non-tax motives and economic benefits and opportunities; (2) that the diligence, negotiation, terms and timing of the stock sale transaction were reasonable and did not present any red flags; and (3) as a tax professional in 2006, he did not believe that the stock sale transaction was in any way or could be considered a tax shelter. Mr. Rountree's opinions are based on his education, work

> experience and his personal involvement in communications with the parties and their professionals to the stock sale transaction and in addressing diligence as part of the transaction and his review of the Share Purchase and Sale Agreement and related documents and communications. An additional summary of the facts and opinions which Mr. Rountree is expected to testify also is available in his two deposition transcripts previously taken by the United States and in the documents that he authored, received or reviewed in the document productions of Bohm Wildish Matsen, Bryan Cave, the Daltons and Rountree.

"Rebuttal Expert Disclosure," Decl. of Russell Edelstein ("Edelstein Decl."), Ex. 83, Dkt. No. 115-3 at 3.

The Government moves to exclude Rountree on the grounds that Rountree is being improperly smuggled in as a retained expert for whom the Daltons did not submit an expert report as required by Federal Rule of Civil Procedure 26(a)(2). Fed.R.Civ.P. 26(a)(2)(B) ("Unless otherwise stipulated or ordered by the court, [the] disclosure [of the expert] must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case . . ."). The Government further argues that the one-paragraph disclosure of the contents of Rountree's opinions was insufficient.

The Daltons assert that Rountree is an unretained expert not required to submit a written report under Rule 26. Dalton Opp'n at 2-3. Rule 26 distinguishes between experts "retained or specially employed to provide expert testimony," which must provide a written report, and "unretained experts," also called "percipient expert witnesses." Fed. R. Civ. P. 26(a)(2)(B); see also Emelianenko v. Affliction Clothing, No. 09-07865-MMM (MLGX), 2011 WL 13176755, at *6-7 (C.D. Cal. July 28, 2011).

i. Rountree is an Unretained Expert

"[U]nretained experts are limited in an important respect[, however;] they cannot give opinion testimony based on information obtained outside of their

personal knowledge." Emelianenko, 2011 WL 13176755, at *7 (internal quotations and citation omitted). "[An] expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of this lawsuit ... should be treated as an ordinary witness." Oakberg v. Zimmer, Inc., 211 F. App'x 578, 580 (9th Cir. 2006) (quoting Advisory Committee Notes to Federal Rule of Civil Procedure 26(b)(4)).

As a non-retained expert, Rountree is only exempt from Rule 26(a)(2)(B)'s written report requirement to the extent that his opinions were formed in the scope of his involvement as a fact witness. See Goodman v. Staples The Off. Superstore, LLC, 644 F.3d 817, 826 (9th Cir. 2011) (finding same regarding treating physicians as non-retained experts). To the extent that Rountree is treated as a retained expert to opine on things outside the scope of his involvement, that opinion and testimony is excluded for failure to properly disclose. See Goodman v. Staples The Off. Superstore, LLC, 644 F.3d 817, 827 (9th Cir. 2011) (Federal Rule of Civil Procedure 37 "forbid[s] the use at trial of any information that is not properly disclosed.").

Accordingly, although Rountree may offer opinions as an unretained expert, Rountree may not offer general expert rebuttal testimony, or indeed any opinion testimony on topics that are "outside of [his] personal knowledge." Emelianenko, 2011 WL 13176755, at *7.

ii. Rountree's Scope of Testimony as Unretained Expert

As an initial matter, Rountree makes a number of seemingly contradictory statements about his involvement and role with regards to the 2006 Transaction. For example, in his deposition of July 1, 2022, Rountree makes the following statements: "I was conducting due diligence on behalf of the seller," Ruskusky Decl., Ex. 4, Dkt. No. 129-5 at 11; "I was not retained to look for red flags"; id. at 11; "Had I seen a lack of due diligence and [the buyers] not asking information on the tax attributes of the company, I would have raised the red flag"; id. at 13. In particular, while it seems clear that Rountree was involved in the diligence of the Transaction, it is not completely clear whether Rountree was actually looking for "red flags" or abnormalities. But as will be discussed in greater detail below, identifying red flags (or not identifying them) is almost necessarily part of

conducting diligence. With this in mind, the Court considers the three topics that the Daltons disclose to be part of Rountree's "rebuttal" testimony.

First, the Daltons assert that Rountree will opine that "the stock sale transaction and related documents were arms-length, involved fair value, reasonable, valid and had non-tax motives and economic benefits and opportunities." Rebuttal Expert Disclosure at 3. Rountree testifies at his deposition, on multiple occasions, that he "[w]as not involved in any of the discussion on the sale," was not involved in the negotiations, was "not privy to any information on price" or "decisions on what a fair price was," and "was not involved in the decision to sell or buy businesses." Decl. of Russell Edelstein, Ex. A ("Rountree Dep. I"), Dkt. No. 115-4 at 6.[4] Accordingly, the Transaction's fair value, reasonableness, validity, and economic benefits and opportunities are admittedly outside the scope of Rountree's involvement as a fact witness, and Rountree's opinions on those topics must be excluded. The Daltons highlight Rountree's deposition testimony about a conference call where Rountree recalls that the buyers "saw strategic value" and "goodwill . . . in the Dalton name." See Opp'n to Mot. Exclude Rountree at 11. Ignoring hearsay issues, Rountree may testify as to facts to which he was witness, but Rountree repeatedly disclaimed any role in the foregoing topics; and cannot purport to offer expert opinions on those topics.

As for the "tax motives," the Daltons offer Rountree's testimony that "[t]here were no tax motives present that I witnessed" because had Rountree witnessed such motives, "it would have been brought to the attention of the sellers of the stock." Ruskusky Decl., Ex. 4, Dkt. No. 129-5 at 11. Essentially, the basis of Rountree's opinion that the Transaction was not tax-motivated was that there was plenty of diligence done. He states: "I am very confident that enough diligence was done for me to have the opinion at the time that there was not a red flag and that this as not a tax-motivated transaction." Id. Given Rountree's involvement as an accountant performing diligence, the issue of tax motives seems likely to have been part of this role, and indeed Rountree asserts that it was.

Second, the Daltons assert that Rountree will opine that "the diligence, negotiation, terms and timing of the stock sale transaction were reasonable and did

[4]The Court refers to page numbers inserted by the CM/ECF system.

not present any red flags." Rebuttal Expert Disclosure at 3. Because Rountree stated he was "not involved in any of the negotiations," he may not opine on the reasonableness of the negotiations or whether the negotiations presented red flags. Rountree specifically states that he was "engaged to be a historian recorder at the business and to provide various due diligence items." Rountree Dep. I at 6-7. These are the topics that Rountree may discuss. Rountree may opine as a percipient fact witness and expert as to the reasonableness of the diligence, and as to the contracts or documents that Rountree himself specifically reviewed in the scope of his involvement with the Transaction. As observed above, Rountree states both that he was not retained to look for red flags and also that he was responsible for raising red flags. However, it would seem that identifying red flags is at least implied in the mandate of performing diligence. Accordingly, to the extent that the Daltons are able to justify Rountree's involvement in that aspect and the types of red flags that he necessarily would have raised, such an opinion is admissible.

Third, the Daltons assert that Rountree will offer the opinion that "as a tax professional in 2006, he did not believe that the stock sale transaction was in any way or could be considered a tax shelter." Rebuttal Expert Disclosure at 3. Given Rountree's involvement in conducting the diligence, as an accountant and "historian recorder" in the Transaction, as well as his qualifications as an Accountant (which the Government does not challenge) Rountree is qualified to state such an opinion.

The Government highlights the fact that Rountree disagrees with the opinions stated in the Blouin Report despite not knowing who Blouin was and indicating that Rountree had not reviewed the report. See Mot. Exclude Rountree at 7. This is because the Daltons disclosed Rountree as an expert who was going to offer "rebuttal testimony" to the Blouin Report. As discussed, Rountree, as an unretained expert, may testify only as to those facts to which he was a percipient witness, and the Court agrees that Rountree cannot offer general rebuttal testimony to Blouin's report (it is outside of the scope of Rountree's involvement in the events). But after striking those topics as to which Rountree cannot testify, the disclosure is sufficient. "A principle purpose of Rule 26(a)(2) is to permit a reasonable opportunity to prepare for effective cross examination and . . . arrange for expert testimony from other witnesses." Fed. R. Civ. P. 26(a)(2), Advisory Committee's Notes, 1993 amendment, Paragraph 2. "The unretained experts, who

formed opinions from pre-litigation observation, invariably have files from which any competent trial attorney can effectively cross-examine." Emelianenko, 2011 WL 13176755, at *6 (quoting Sprague v. Liberty Mut. Ins. Co., 177 F.R.D. 78, 81 (D.N.H. 1998)). Because the Government had the ability to obtain the materials necessary to cross-examine Rountree regarding his opinions and as to his knowledge of the 2006 Transaction, the disclosure is otherwise sufficient.

iii. Conclusion Regarding Rountree's Testimony

In sum, Rountree can only offer opinions to the extent they relate to the scope of his involvement in the events at issue. Given Rountree has quite explicitly disclaimed his personal knowledge of the following topics, Rountree's opinions regarding the Transaction's fair value, reasonableness, validity, and economic benefits and opportunities, and opinions regarding the negotiations of the Transaction, shall be **EXCLUDED**.

Rountree may testify as to his percipient observations and opinions as to whether the Transaction had non-tax motives (based on his role in conducting diligence); that the diligence of the stock sale transaction was reasonable and did not present any red flags; and that as a tax professional in 2006, he did not believe that the stock sale transaction was in any way or could be considered a tax shelter.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** the motion to exclude Blouin's report and opinions, except the Court **STRIKES** Blouin's opinions as to the Daltons' state of mind as described in section III.A.iii.

The Court **GRANTS in part** the Government's motion to exclude O'Donnell's opinions. The Court **STRIKES** O'Donnell's opinions as discussed in section III.B.ii. The motion is otherwise **DENIED**.

The Court **GRANTS in part and DENIES in part** the Government's motion to exclude Rountree's rebuttal expert testimony as described in section III.C.iii.

IT IS SO ORDERED.